

F. M. S. REPORTS

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

April 8, 1938.

K. SOCKALINGAM MUDALIAR.....Plaintiff
vs.

1. M. R. M. RAMASAMY CHETTIAR

2. A. VEERAMAL.....Defendants

[PERAK CIVIL SUIT No. 124 of 1937]

*Unregistered charge—attachment of lands
by judgment-creditor—priorities—application of
equitable principles.*

The second defendant was the registered proprietor of three pieces of land. As on the 22nd of January 1937 there were in existence two duly registered charges and one registered caveat affecting these lands. The two charges were in favour of the first defendant and the caveat had been registered at the instance of two women. On the same date the second defendant executed another charge over the lands in favour of the plaintiff. Owing to his failure to present the issue documents of title together with the charge the plaintiff was not able to obtain registration. On the 24th of February 1937 the plaintiff lodged and duly registered a caveat to protect his interest in the lands. In the month of March 1937 the two registered charges in favour of the first defendant were paid off and the discharges registered. In the same month the first defendant attached the same lands under a decree of the Ipoh Magistrate's Court in his favour against the second defendant for \$359.60 and costs. The attachment was also registered. In June 1937 the caveat lodged at the instance of the two women was withdrawn. In an action by the plaintiff claiming a declaration that the three pieces of land were not liable to attachment by the first defendant, or, in the alternative, that such attachment was subject to his unregistered charge:—

Held, that the unregistered charge conferred on the plaintiff an equitable interest in the lands, which the Court ought to protect.

Held further, that the lands could only be sold in execution subject to the plaintiff's unregistered charge.

Pillay & anor. v. The Official Assignee, Perak Civil Appeal No. 7 of 1928 (unreported) followed.

TRIAL OF ACTION.

Tuan Haji Wahab for the plaintiff.

John L. Woods for the defendants.

Cur. Ad. Vult.

AITKEN, J.—This suit raises a difficult and interesting question as to the effect of a prior unregistered charge on the title to lands which have subsequently been attached by a judgment creditor in execution of his decree. There is no dispute as to the facts of the case, which are shortly as follows:—

A. Veerammal, the 2nd Defendant, is the registered proprietor of three pieces of land in the Mukim of Lenggong, of which the E.M.R. Numbers are, respectively, E.M.R. No. 1870, E.M.R. No. 2179, and E.M.R. No. 2180.

On the 22nd of January, 1937, there were two duly registered charges and one duly regis-

tered caveat in existence affecting all these three pieces of land:—

Charge Presentation No. 1977 registered on the 19th of February 1924 in favour of the 1st Defendant; Charge Presentation No. 3066 registered on the 11th of June 1936 in favour of the 1st Defendant, and Caveat No. 3509 registered on the 7th of July, 1936, at the instance of two women named Meenachee and Marimuthu.

On that same date, i.e., the 22nd of January 1937, the 2nd Defendant executed another charge over these 3 pieces of land in favour of the Plaintiff, the consideration therefore being \$3,300.

The Plaintiff presented his charge to the Collector of Land Revenue at Lenggong for registration; but the latter quite properly refused to register it, because the Plaintiff had failed to present the issue documents of title together with his charge as required by Section 129 of the Land Code. It would seem that these issue documents of title were then with the first Defendant, who was presumably unwilling to part with them.

On the 24th of February, 1937, the Plaintiff, not having been able to obtain the registration of his Charge, lodged a caveat to protect his interest under the same with the Collector at Lenggong, and that caveat was duly registered on the same date as Caveat No. 3846. It distinctly sets out the Plaintiff's claim to an "interest" in these 3 pieces of land by virtue of his (unregistered) charge of the 22nd of January, 1937.

On the 5th of March, 1937, the first Defendant attached these 3 pieces of land under and by virtue of a decree of the Ipoh Magistrate's Court in his favour against the 2nd Defendant for \$359.60 and costs. This attachment was made by a prohibitory order under Section 294 of the Civil Procedure Code dated the 4th of March, 1937 and registered in the Mukim Register at Lenggong on the next day. It is admitted that the 1st Defendant had notice of the Plaintiff's unregistered charge when he caused this attachment to be made.

At some time or other during the same month of March, 1937, the first Defendant's two charges over these 3 pieces of land were paid off, and the consequential discharges were duly registered on the 31st of that month.

On the 1st of April, 1937, the woman Meenachee, whom I have already mentioned in connection with caveat No. 3509 of the 7th of July, 1936, registered another caveat in respect of these 3 pieces of land as No. 3897, in which she claimed to have a lien over one undivided half interest in the same. I am told by learned counsel on both sides that I am in no wise con-

cerned with that caveat in this suit, and I am prepared to accept their joint assurances on that point.

On the 17th of June, 1937, the Collector of Land Revenue at Lenggong, at the instance of the Plaintiff, withdrew Caveat No. 3509 which had been lodged in respect of these 3 pieces of land by Meenachee and Marimuthu on the 7th of July, 1936.

On the 28th of September, 1937, the Plaintiff applied to the Court of the Magistrate at Lenggong either for cancellation of the 1st Defendant's prohibitory order of the 5th of March, 1937, or for a declaration that such prohibitory order was subject to the Plaintiff's rights as a Chargee. These proceedings came to naught, and on the 8th of November, 1937, the Plaintiff instituted this Suit claiming a declaration that these 3 pieces of land are not liable to attachment by the 1st Defendant or, in the alternative, that such attachment is subject to the plaintiff's unregistered charge of 22nd of January, 1937.

On the 23rd of December, 1937, the Defendant filed his defence contending that his attachment is a valid legal attachment; that he is entitled to have these 3 pieces of land sold free from any charge in favour of the Plaintiff; and that he is entitled to the proceeds of a sale of these lands to the extent of his judgment in priority to any claim by the Plaintiff.

Before I proceed to discuss and decide the question of law so raised by the plaint and defence I should mention, to round off my exposition of the facts out of which it arises, that these 3 pieces of land have twice been proclaimed for sale, and on each occasion it was stated that the rights of the 2nd Defendant would be sold subject to the caveats lodged by the Plaintiff and Meenachee respectively. The prohibitory order of the 5th of March, 1937, has been extended from time to time and is still in force.

The arguments placed before me by the learned counsel engaged were as follows:—

Tuan Haji Wahab, on behalf of the plaintiff, contended that an execution creditor who attaches his debtor's lands cannot achieve a better position in relation to an unregistered chargee, who has lodged a caveat to protect his interest, than that of the registered judgment debtor proprietor himself. In support of this proposition he cited *S. Gulabchand v. Bhaichand*, 6 Bombay 193; *In re General Horticultural Co.*, 32 Ch. D. 512; *Whitworth v. Gaugain*, 67 E.R. 444, *Eyre v. McDowell*, 11 E.R. 871.

In the first of these cases Westropp C.J. laid down the law thus (See 6 Bombay 202):—“When the Court sells the right, title and interest of a judgment debtor in property, we think that it cannot be regarded as selling more than the judgment debtor could himself honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if, by concealment of a sub-mortgage or other mortgage, he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sells only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge the property from any unregistered incumbrance which was binding on the judgment-debtor.”

In the same case Mcvill, J. expressed himself in those terms (See Page 207):—“I may add that, if an execution purchaser were treated as a purchaser for value without notice, a person who had created a mortgage on his estate, and who could not, therefore, sell his estate, as unincumbered, without exposing himself to a prosecution for cheating under the Penal Code, might, by confessing judgment and having the estate sold by the Court, be able to get rid of the mortgage, and obtain the full price of an unincumbered estate.”

There are passages in the judgments in the 3 English cases cited by Tuan Haji Wahab to the same effect, and it will suffice if I quote one short and clear passage from the judgment of Wigham V.C. in *Whitworth v. Gaugain*:—“I feel that I stated the general principle correctly in *Langton v. Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his judgment debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it.”

Tuan Haji Wahab next contended that the Plaintiff had an equitable interest in these 3 pieces of land by reason of his unregistered charge, and argued that equitable interests, though outside the provisions of the Land Code, should be protected and have, in point of fact, been recognised by the Privy Council and the Courts of the F.M.S. He admitted that an equitable interest similar to the Plaintiff's interest in this case was disregarded by the F.M.S. Court of Appeal in the case of *Ng Yew v. Perumal Mudaly*, 5 F.M.S.L.R. 21, but suggested that this case had been over-ruled by a

subsequently unreported decision of the same Court of Appeal in the case of *Pillay and another v. The Official Assignee and two others* (Perak Civil Appeal No. 7 of 1928). He also cited the following cases to show that the Privy Council and the Courts of the F.M.S. will give effect to equitable interests, though outside the provisions of the Land Code, in proper circumstances:—

Loke Yew v. Port Swettenham Rubber Co., Ltd. 1913 A.C. 491;

Yap Tai Cheong v. Wong Kam, 2 F.M.S.L.R. 244;

Boase v. Clunny Rubber Estates Ltd. 2 F.M.S.L.R. 130, and

V. Sivaguru v. Palaniappa Chetty, 1936 F.M.S.L.R. 109 and 229 (1936) 5 M.L.J. 199.

Mr. Woods, for the 1st Defendant, based his argument on the provisions of the Land Code. He pointed out that Section 96 of that Code provides, *inter alia*, that no instrument shall be effectual to pass any interest in land, or to render any land liable as security for the payment of money, until it is registered in the prescribed manner. In this case the Plaintiff made an attempt to register his charge, but failed because he could not comply with the provisions of Section 129 of the Code and produce the issue documents of title of these 3 pieces of land. Such failure was entirely due to his own fault as he took his charge of the 22nd of January, 1937, at a time when he was well aware that the issue documents of title were in the custody of the 1st Defendant in his capacity of 1st Chargee, and that the 1st Defendant was entitled to retain them in his custody. Thus, according to Mr. Woods, the Plaintiff has no legal or equitable interest in these 3 pieces of land which the Court can protect; and he put forward a further claim, which in my opinion is quite insupportable, that the effect of Section 55 of the Code is to make all unregistered transactions in regard to lands within the F.M.S. "null and void and of no effect."

Turning to the effect, if any, of the Plaintiff's caveat, Mr. Woods contended that a caveat cannot take the place of registration, and that it only prohibits the registered proprietor from making any transfer, charge or lease of the lands in question after the caveat has been lodged and registered. According to him it is only effectual as between caveator and caveatee, and cannot affect an attachment and sale of the registered proprietor's interest in the land by way of execution. He closed his argument with the assertion that a judgment creditor, who attaches and sells his judgment debtor's lands, has a right to sell them subject only to any legal interests vested in third parties.

Now I agree that a caveat cannot possibly be regarded as taking the place of registration,

but my difficulty in acceding to Mr. Woods' arguments based on the Land Code is this: the 2nd Defendant herself could not have made an honest transfer of these 3 pieces of land to anyone in view of the Plaintiff's unregistered charge for which she received good consideration. If, in spite of that charge, the 2nd Defendant had transferred these 3 pieces of land to a third person who had received notice of that charge then, surely, even a full compliance with the provisions of the Land Code in regard to registration would not save such a transfer from being set aside on the ground of fraud: See Section 42 (ii) of that Code. Assuming that these two propositions are granted, and I feel reasonably confident that they should be granted, then why should the 1st Defendant be allowed to do something which the 2nd Defendant could not honestly do, and why should he be allowed to sell the 2nd Defendant's lands without passing on to intending purchasers the notice which he himself has received of the Plaintiff's unregistered charge.

My difficulty in this respect is not lessened by my knowledge of the facts (1) that the issue documents of these 3 pieces of land are now in the Plaintiff's possession, and (2) that there is nothing to prevent him obtaining a valid registration of his charge but the 1st Defendant's prohibitory order (which the latter was careful to obtain whilst the documents of title were still in his possession). It seems to me that in this case the 1st Defendant is seeking to do something which would be a fraud if done by the 2nd Defendant, his judgment debtor; and I am not prepared to hold that the Court must lend its sanction to such conduct unless I am constrained to do so by Enactments whose words cannot possibly be construed in any other sense, or by authorities to which I must, in duty bound, give way.

Mr. Woods was able to cite two cases which appear to support his contention that sales in execution of a judgment debtor's lands are subject only to legal interests vested in third parties, and not to any such equitable interests. The first is *Ng Yew v. Perumal Mudaly* (5 F.M.S.L.R. 21), of which I have already made mention; the second is the Johore case of *Alagappa Chetty v. Ng Guan Yin*, which is reported in 5 F.M.S.L.R. at page 236. In regard to this Johore case, I may as well say at once that I do not consider myself bound by it because (a) it is a decision of a Court of first instance, (b) no question of notice arose therein, and (c) it turns in part on certain stringent provisions in S. 5 of the repealed Registration of Titles Enactment, 1911, which are not reproduced in our present Land Code. Thus, that Section 5 enacted that "all land which is comprised in any grant... shall

not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Enactment." Up to that point its provisions are reproduced in Section 55 of our present Land Code, but its further provisions making "every attempt to transfer, transmit, mortgage, charge or otherwise deal with" such lands "null void and of no effect" have been omitted from our present Code.

As to the case of *Ng Yew v. Perumal Mudaly*, the decision therein turns on the provisions of a section of the repealed Land Enactment, 1911, which have not been exactly reproduced in our present Land Code. The section in question is Section 42 of that Enactment, and it provides that "no claim or interest in any land held under Part III of the Enactment should be valid unless it had been registered in accordance with the provisions of the Enactment." I must admit, however, that if *Ng Yew v. Perumal Mudaly* stood alone, I should find some little difficulty in distinguishing it from this case because the provisions of Section 55 and 96 of our present Land Code appear to be of much the same effect as those of the repealed Section 42. Fortunately it does not stand alone, and as the unreported case of *Pillay and another v. The Official Assignee and others* is a Perak case, I have been able to obtain the Court file dealing with it. Although the three Judges in the Court of Appeal delivered oral judgments only, of which no record remains, yet several useful facts and conclusions emerge quite clearly from a study of the pleadings, the judgment of Prichard, J. and the Order of the Court of Appeal allowing the appeal.

The essential facts in that case may be stated very concisely as follows:—In 1924 the registered proprietors of a piece of land executed a transfer thereof to the plaintiffs, of which the Plaintiffs could not obtain registration because the certificate of title had been deposited with the 2nd Defendant as some kind of security for a loan. Apparently the Plaintiffs did not know of this, but as they could not obtain registration of their transfer in the absence of the issue document of title, they lodged a caveat to protect their interest in the land. In 1927 the 2nd Defendant attached the interest of the 3rd Defendant, who was one of the registered proprietors, in the land, whereupon the Plaintiffs instituted a suit against the proper parties claiming a declaration that they were the beneficial owners of the land and asking for an order directing the Registrar of Titles to register them as the owners thereof in equal shares.

Prichard, J. who heard the case at first instance, stated the question at issue therein to be "can an unregistered transfer in respect

of which a caveat has been lodged, take precedence over an attachment." In his opinion it clearly could not do so, because of certain provisions to be found in Section 25 of the Registration of Titles Enactment, 1911, which he quoted in his judgment:—

"No instrument until registered in the manner hereinbefore described shall be effectual to pass any land or any interest therein or to render such land liable as security for the payment of money."

Now, it is to be observed that these provisions of Section 25 of that repealed Enactment are reproduced, almost word for word, in Section 96 of our present Land Code, that is, the Section on which Mr. Woods places most reliance. The judgment of Prichard, J. dismissing the Plaintiff's claim with costs was delivered on the 28th of July, 1928, and the appeal therefrom was heard by Gomperts C.J., Acton and Thorne JJ., on the 19th of September in the same year. In spite of the Johore case and the case of *Ng Yew v. Perumal Mudaly (ubi supra)*, both of which were cited to them during the argument, their Lordships on the Court of Appeal unanimously reversed the judgment of Prichard, J. and gave the Plaintiffs the relief they were claiming. It is, of course, a matter of regret that no record exists of the oral judgments they delivered, but it is reasonably clear that they differed entirely from the view which Prichard, J. had taken of the provisions of that Section 25 of the Registration of Titles Enactment, 1911.

I do not think that I need say any more on the question raised in this suit. I hope that my statement of the same at the very beginning of this judgment is clear enough, and I have already explained why I am not prepared to accept Mr. Woods' contentions there-^anant unless absolutely constrained to do so. Upon my view of the law and the authorities I am not constrained to do so, and I think I am only following the unreported decision of the Court of Appeal in *Pillay and another v. The Official Assignee and two others* when I hold that the Plaintiff's unregistered charge of the 22nd of January, 1937, does operate to confer on him an equitable interest in these 3 pieces of land which, in the circumstances of this case, the Court ought to protect. I do not think for a moment that he is entitled to a declaration that these 3 pieces of land are not liable to attachment, but in my opinion he is entitled to a declaration that they can only be sold in execution subject to his unregistered charge. I therefore give judgment for the plaintiff awarding him that relief, and the 1st Defendant must pay the Plaintiff his taxed costs of this suit incurred in connection with his claim against the 1st Defendant.

Judgment accordingly.